FILE COPY.

23077

Supreme Court U. S.
FILED
APR 5 1904
JAMES H. McKENNEY,
Clerk.

upreme Court of the United States.

OCTOBER TERM, 1903. No. 253.

HANKS DENTAL ASSOCIATION

against

INTERNATIONAL TOOTH CROWN COMPANY.

BRIEF FOR INTERNATIONAL TOOTH CROWN COMPANY.

WALTER D. EDMONDS,
Counsel for International Tooth Crown Company,
31 Nassau Street,
New York City.

APPEAL PRINTING CO., 14 Vesey St., New York. TEL. 192 CORTLANDT.

23078

Supreme Court of the United States.

HANKS DENTAL ASSOCIATION,
Plaintiff-in-Error

against

INTERNATIONAL TOOTH CROWN COMPANY,
Defendant-in-Error.

October Term
1903
No. 253.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Defendant-in-Error.

The sole question before this Court is expressed in the inquiry certified as follows:

"Was the order of the Circuit Court directing "the President of the Hanks Dental Association, "the defendant in that Court to appear before a "Master or Commissioner appointed pursuant to "the provisions of Section 870, *et seq.*, of the "Code of Civil Procedure of the State of New "York, valid and authorized under the Act of "March 9, 1892?"

In other words has the Circuit Court, since the passage of the Act of March 9, 1892, power, in its

discretion, to employ modes of proof prescribed by the laws of the State in which said Circuit Court is held?

Said Act of 1892 (27 Statutes at large, page 7) reads as follows:

"Chap. 14. An act to provide an additional "mode of taking depositions of witnesses in causes "pending in the Courts of the United States.

"Be it enacted by the Senate and House of "Representatives in Congress assembled, that, in "addition to the mode of taking depositions of "witnesses in causes pending at law or in "equity in the District and Circuit Courts of the "United States, it shall be lawful to take the dep- "positions, or testimony, of witnesses in the mode "prescribed by the laws of the State in which the "Courts are held."

"Approved March 9, 1892."

It is admitted by defendant-in-error that prior to the passage of this act, an examination of a party before trial could not be had under the New York Code in the Circuit Courts within that state, because of the ruling of this court in *ex parte* Fisk (113 U. S., 724).

The question, in its broadest aspect, relates to the production of evidence in the Federal Courts in actions at law.

U. S. Revised Statutes, Section 861, reads:

> "The mode of proof in common law actions "shall be by oral testimony and examination "of witnesses in open court, except as herein- "after provided."

The other modes of proof, as outlined by the Revised Statutes, are

(*a*) Depositions *de bene esse* (Sec. 863), and
(*b*) Depositions *dedimus potestatem* (Sec. 866):

Section 867, provides as follows:

> "Sec. 867. Any court of the United States "may [italics are counsel's] *in its discretion*, "admit in evidence in any cause before it any "deposition taken in *perpetuam rei memo-* "*riam*, which would be so admissible in a "court of the state wherein such case is pend- "ing, according to the laws thereof."

It will be noted that of these modes of proof, Section 863 refers specifically to "the testimony of any witness in any civil cause" taken by deposition *de bene esse*, and that Section 866 refers altogether to "depositions according to common usage."

FIRST.

The Act of 1892 by its very language adds to the modes of proof theretofore available in the District and Circuit Courts.

The New York practice of examination of a party or witness before trial had been long in existence prior to the passage of the Act of 1892.

As was said by the New York Court of Appeals in Glenney v. Stidwell (64 N. Y., 120, 122, decided in 1876.

> "As a general rule, a court of equity has "jurisdiction to entertain a bill, for discovery "of facts which may aid in the prosecution or "defense of an action in another court, and "which may enable the plaintiff to ascertain "who will be proper parties to the action "* * * . This jurisdiction was conferred "upon the Supreme Court by the Constitution "of 1846" (Art. 6, Sec. 3).

See also Lyon v. Manhattan Ry. Co. (142 N. Y., 306).

It was perfectly proper to require the president of the defendant corporation to appear before a master of the Circuit Court (Code of Civil Procedure, Sec. 872, sub-div. 7 and Sec. 873).

The Circuit Court rightly held that the objection that the order described the referee as a special master is trivial and without merit (112, Fed. Rep., 396).

The Circuit Court also held that the deposition was properly taken and was admissible by virtue of said act (101 F. R., 306).

Such holding constituted a proper exercise of the discretionary power vested in the Circuit Court by said Act of 1892.

The most recent and exhaustively considered expression of judicial opinion on this subject is that in the Ninth Circuit, where the court held:

> "The Circuit Court of Appeals for the First "Circuit has held that this statute was intend- "ed to simplify the practice of taking deposi- "tions in the instances authorized by the "federal laws, and that it does not authorize "the taking of depositions in instances not pre- "viously authorized by the Federal Statutes "and that it does not confer additional rights "to obtain proof by interrogatories to be "answered by the adverse party in actions at "law. Register Co. v. Leland, 37 C. C. A., "372, 94 Fed., 502. With all due deference "to that learned court the construction thus "given to the statute is in my opinion unwar- "ranted for two reasons, viz: First, it inter- "polates and reads into the statute words of "limitation which Congress did not see fit to "put into it; and, second, it fails to give "effect to all the words which the act contains, "because, if only depositions may be taken in "the mode prescribed by the laws of the "State, then the words 'or testimony' are "meaningless and superfluous, whereas the "rules for the interpretation of statutes "require the court to give effect to every "word of a statute, if it is possible to do so

"consistently with the manifest intent of the "legislature. I concur with Judge Lacombe "in his opinion in the case of International "Tooth Crown Co. v. Hanks Dental Ass'n (C. "C.) 101 Fed., 306, in which he construed the "Act of March 9, 1892, as providing additional "modes of taking testimony, so as to enable "the Federal Courts to avail of all modes pre- "scribed by the laws of the different statess "and adapted to the several communitier "where the courts sit; and I especially concur "in his statement that 'the practice of exam- "ination before trial * * * is a most "wholesome one; it tends to simplification of "the trial, and frequently leads to settlement "out of court.' "

Smith v. Northern Pacific R. R. Co., 110 F. R., 341, 343.

The opinion of Judge Lacombe, herein above referred to, is as follows:

"Ever since the passage of the Act of March 9, 1892, it has been uniformly construed in this court as providing additional modes for taking testimony, so as to enable the Federal Courts to avail of all modes prescribed by the laws of the different states and adapted to the several communities where the courts sit. It is supplementary to Section 914, Rev. St. U. S., securing a uniformity in the mode of taking proof which that section was no doubt intended to secure, but which it failed to secure under the interpretation of the Supreme Court in *ex parte* Fisk, 113 U. S., 724, 5 Sup. Ct., 724, 28 L. Ed., 1117. I do not find in Register Co. v. Leland, 37 C. C. A., 372, 94 Fed., 505, sufficient reasons for reversing former decisions of this court, nor for declining to avail of any mode of taking proof which the state laws provide. The practice of examination before trial under the New York practice is a most wholesome one. It tends to simplification of the trial, and frequently leads to set-

tlement out of court. The examination should proceed."

International Tooth Crown Co. v. Hanks Dental Ass'n, 101 Fed. R., 306.

A contrary view had been previously entertained in the First Third and Eighth Circuits as appears by the first four decisions hereinafter referred to. Other casesdo not apply as they were either prior to the Act of 1892 or contain mere *obiter dicta* on this subject.

One of the crucial inquiries in this connection is, what meaning is to be attributed to the word "mode" in Act of 1892. Does it refer to mere "*practice*," or "*form* of procedure" solely, or, to an additional "*mode* of proof," whereby depositions may be had upon grounds not previously specified in the Revised Statutes.

The opinions of the learned judges who have held that the Act of 1892, does not provide an additional "*mode* of proof" evince a cursory treatment of this subject and are solely and expressly based upon the consideration that the word "mode" as contained in the Act of 1892, must be taken to refer only to "*practice*" or "*form*."

In National Cash Register Co. v. Leland (77 F. R., 242); Aldrich, D. J., says: "It" (Act of 1892) "was only intended to simplify *the practice* of "taking depositions by providing that the mode "of taking * * * might conform to the mode "prescribed by the laws of the state" (p. 243). This language and reasoning were adopted, *verbatim*, and apparently without further consideration by the Circuit Court of Appeals in the same case (94 F. R , 502, 505).

In Shellabarger v. Oliver (64 F. R., 306), Foster, D. J., says: "It adopts the mode *or manner* of "taking the depositions *practiced* in the State

"Courts, but not the causes or grounds for taking "such depositions" (p. 308).

In Despeaux v. Penn. R. Co. (81 F. R., 897), Dallas, C. J., as appears by the report and the reporter's note, merely followed, without adding to the reasoning as above stated in Shellabarger v. Oliver and National Cash Register Co. v. Leland.

In Int Tooth Crown Co. v. Vinson, *unreported*, Kirkpatrick, D. J., relied upon, without adding to the reasoning in National Cash Register Co. v. Leland (*supra*).

Defendant-in-error contends that the limitation placed upon the meaning of the word "mode" by these earlier decisions is directly at variance with the meaning previously adjudicated for it by this court in *ex parte* Fisk (113 U. S., 713).

In that case, decided in 1884, and passing solely on the power of the Circuit Court to compel a deposition like that at bar, this court exhaustively examined and construed the Act of 1872 (the "Conformity Act") to determine its effect upon previous acts of Congress establishing the "mode of proof" in U. S. courts, and said, first referring to the Act of 1872:

"This enacts that 'the practice, pleadings and "forms and modes of proceedings' * * * in "the Circuit and District Courts shall conform, as "near as may be to the practice, pleadings and "forms and modes of proceedings * * * in "the courts of the state." * * * "But the Act "of 1789, which made the laws of the states rules "of decision, made an exception when it was " 'otherwise provided by the Constitution, treaties "or statutes of the United States.' The case be- "fore us is eminently one of evidence and proced- "ure * * * Coming to consider whether Con- "gress has enacted any laws bearing on the ques- "tion before us we find the following sections of

"the Revised Statutes * * * Sec. 861: '*The* "*mode of proof*, in the trial of actions at Common "Law, shall be by oral testimony and examination "of witnesses in open court, except as hereinafter "provided.' Sec. 863: 'The testimony of any wit- "ness may be * * * taken by deposition *de* "*bene esse* when the witness lives at a greater dis- "tance from the place of trial than 100 miles,' etc. "* * * The remainder of this section and Sec- "tions 864 and 865 are directory as to * * * "*the manner* of taking, testifying and returning "the deposition to the court. Sec. 866 * * * "the courts may grant a *dedimus potes-* "*tatem* to take depositions according to common "usage, etc. * * * Sec. 867 * * * Secs. "868, 869 and 870 prescribe *the manner* of taking "such depositions (p. 722). * * * These pro- "visions * * * were intended to provide a "system to govern the practice in these Courts (U. "S). * * * It is enforced by the express lan- "guage of the law in providing *a defined mode of* "*proof* in those Courts and in specifying the only "exceptions *to that mode* which shall be admitted.

"This *mode* is by oral testimony and examina- "tion of witnesses in open Court except as herein- "after provided.

"Of course the *mode* of producing testimony "under the N. Y. Code, which was applied to "petitioner, is not oral testimony and examina- "tion of a witness in open Court. * * *

"We now come to inquire if the testimony "sought to be obtained from the petitioner *by this* "*mode* comes within the exception referred to in "Sec. 861. These exceptions relate to cases where "it is admissible to take deposition *de bene esse* "under Sec. 863, or *in perpetuam* * * * under a "*dedimus* * * * under Sec. 866 (p. 723) * "* * These are the exceptions which the statute "provides to its positive rule that the *mode* of trial

"* * * shall be by oral testimony, etc. Its "purpose is to provide a *mode of proof* in trials at "law to the exclusion of all other *modes of proof* "and because the rigidity of the rule may in some "cases work a hardship, it makes exceptions of "such cases as it recognizes to be entitled to "another rule, and it provides that rule for those "cases. Under one or the other all cases must "come * * *. There is no place for exceptions "made by State Statutes" p. 724. And this Court therefore held that, under the Act of 1872, examination of a party before trial, pursuant to the N. Y. Code, could not be compelled by the U. S. Circuit Court.

By the foregoing language, it is understood that this Court has expressly indicated that the word "mode" did not mean "manner" applying the latter word to the provisions of the statutes relating to practice and form, and has manifestly imputed to the word "mode," reference to the *kind* of proof distinguished by the *grounds* upon which the taking thereof proceeded.

And this court also held, in effect, as previously expressly held by Judge Blatchford, in Beardsley v. Littell, 14 Blatch., 102, that in the Act of 1872— "The expression * * * forms and modes of "*proceeding*, is well satisfied without including the "subject of evidence" (p. 105).

In other words, it seems to have been finally adjudicated that the word "mode," when employed by Congress in the collocations,—"mode of proof" and "mode of taking depositions and testimony of witness," does *not* refer merely to "manner" of taking proof, nor to "practice" in that regard, nor to "forms and modes of proceeding" being the other subjects expressly and separately specified in the Conformity Act of 1872, R. S., Sec. 914, but to a "defined mode of proof," "a mode of *produc-*

ing testimony" characterized and distinguished therefore, not by mere incidents of "practice" or "manner" of procedure, but broadly by its conformity with, or dissimilarity from, the three "modes" previously provided in the Revised Statutes, viz: oral in open court, *de bene*, and under *dedimus*.

Any other interpretation is manifestly at variance with the established canons controlling construction. All the Acts of Congress referred to "are *pari materia* and are to be looked to as one statute in explaining their meaning and import."

Patterson v. Winn, 11 Wheat, 386.
Reiche v. Smythe, 13 Wall, 162, 165.
Potter, Dwarris on Statutes, 145.

"In the construction of a statute, although the "words of the act are generally to have a control-"ling effect, yet the interpretation of those words "must often be sought from the surrounding cir-"cumstances and previous history."

Siemens' Administrator vs. Sellers, 123 U. S., 276.
See also Smith vs. People, 47 N. Y., 330, 339.

The Act of 1872, Sec. 914 "The Conformity Act," was addressed expressly to four different things, viz: 1, practice; 2, pleadings; 3, forms of proceeding and 4, *modes* of proceeding.

It is elementary that it was the duty of the Court to attribute to each of these subjects a different meaning.

Potters' Dwarris on Statutes, p. 198.
Montclair vs. Ramsdell, 107 U. S., 152.
In re New York & Brooklyn Bridge, 72 N. Y., 527, 530.

Hence "mode could not mean practice, nor form, as erroneously contended in the National Cash Register and Shellabarger cases, *ante*.

Moreover, "modes of proceeding" in the Act of 1872, had been already held, as stated, not to include, "modes of proof or taking depositions."

Congress therefore addressed itself to the enactment of the Statute of 1892 with a previously established and adjudicated vocabulary to choose from. It must be conceded that it was intent upon expanding the scope of the Statute of 1872 (the Act of Conformity). Had it intended to limit that expansion to the subject of "*practice*" or "*forms of proceeding*" (as contended in the National Cash Register or Shellabarger cases, *ante*) those words would have been the appropriate ones to select, in which case it would merely have re-enacted the Act of 1872, but it passed these over and directed the Act of 1892 to the enlargement of that other subject matter expressed in the Act of 1872, viz: "mode of proceeding," so as to add thereto, expressly, an additional mode of taking proof or depositions as required by Beardsley v. Littell and *ex parte* Fisk.

The conclusion is irresistible that Congress intended by the Act of 1892 to expand the *mode* of proof available in U. S. Courts, so as to bestow upon suitors therein the benefits of any "*modes of producing testimony*" (113 U. S., 723) open to suitors in the State Courts.

Bank for Savings vs. Collector, 3 Wall, 495, 513.

Viterbo vs. Friedlander, 120 U. S., 707, 726.

Hamilton vs. Rathbone, 175 U. S., 414, 419 and cases cited.

And it is also manifest that the Act of 1892 was passed by Congress directly in consequence of the

limitation imposed upon the Conformity Act of 1872 by the decision *in re* Fisk, else Congress would not have employed so identically the language contained in that decision nor have expressly provided that "*in addition* to the mode "of taking depositions of witnesses * * * it "shall be lawful to take the depositions *or testi-* "*mony* of witnesses in the mode prescribed by the "laws of the State, etc."

U. S. v. R. R. Co., 91 U. S., 72, 79.

Therefore this court should interpret the Act of 1892 as *adding* to the oral testimony in open court, as provided in common law actions by Sec. 861, exceptions other than, and in addition to, those provided by Secs. 863 and 866 (*de bene esse* and *dedimus*) to which *ex parte* Fisk had limited the operation of the Act of conformity of 1872.

Durousseau v. U. S. (6 Cranch., 314).
Montclair vs. Ramsdell (107 U. S., 152).
The Emily vs. The Caroline (9 Wheat., 381).

Another consideration which should prove controlling to discredit the National Cash Register and Shellabarger cases, *ante*, is that their effect is to wholly nullify the Act of 1892.

Those decisions attribute nothing more to that act than had been fully enacted in the Conformity Act as interpreted by *In re* Fisk, *ante*. Their premises and reasoning concerning the Act of 1892 are identically the same as that of this court concerning the Act of 1872—no more, no less. The Act of 1872 provided that " * * * the modes of "proceeding (in U. S. Courts) * * * shall "conform to the modes of proceeding in the courts "of the State." * * * The Act of 1892, that *in addition* "to the mode of taking depositions

"(in U. S. Courts) * * * it shall be lawful to "take depositions or testimony of witnesses in the "mode prescribed by the laws of the State."

Beardsley vs. Littell and *ex parte* Fisk held that *in the absence of* an enactment by Congress of other modes of proceeding *to take proof*, additional to those already in the U. S. Revised Statutes, the language of the Act of 1872 was insufficient to add to those already provided by including State modes.

The National Cash Register and Shellabarger decisions treat the Act of 1892 as though it merely re-enacted the portion last quoted from the Act of 1872.

This is not only against the plain letter of the Act of 1892, which by its title provides "*an addi-*"*tional* mode of taking depositions," thus affording the additional express enactment deemed essential by this court, but is directly at variance with all established canons controlling the interpretation and construction of statutes.

> Knowlton v. Moore, 178 U. S., 41, 65, and cases cited.
>
> Holy Trinity Church v. United States, 143 U. S., 457, 462.
>
> Mining Co. v. South Carolina, 144 U. S., 550, 563.
>
> Price v. Forrest, 173 U. S., 410.

It is elementary that a law must be construed, if possible, so as to give it force, and not so as to nullify it, and particularly is this the case where the law in question deals with a subject matter previously held by the courts to have been inadequately secured by previous legislation.

> Wilmot v Mudge, 103 U. S., 217, 221.
>
> Lau. Ow. Bew. v. U. S., 144 U. S., 47, 59, and cases cited.

Holmes v. Carley, 31 N. Y., 289, 290.
Donaldson v. Wood, 22 Wendell, 395.
Dibble v. Hathaway, 11 Hun, 574.
Potter's Dwarris on Stat., sec. 194, n. 13.

Finally, the construction of the Act of 1892 contended for by defendant-in-error would prove wholly advantageous to courts, to suitors, and generally to the administration of justice. The opinions rendered in the Second and Ninth Circuits (*ante*) point out some of the grounds for this conclusion. To these may be added the following considerations:

(1.) The enforcement of the modes of taking depositions or testimony provided by State Statutes, would, in the United States Courts, be limited to cases where, *in the discretion of the Court*, the remedy is "necessary to prevent a failure or delay of justice." This principle is established in Railway Co. v. Horst, 93 U. S., 291, 300.

(2.) The effect of the Act of 1892 would be to afford *within 100 miles from place of trial* no more than is now accorded by R. S., Sec. 863, providing for depositions *de bene esse*, that is to say, an opportunity to thrash out exhaustively in advance of the trial, a multitude of essential though incidental proofs depending frequently, as in the case at bar, on examination of books and accounts and which cannot otherwise be accomplished with requisite certainty and exhaustiveness under the inevitable pressure of proceedings before the jury without unduly pre-empting the time of judge and jury and obstructing the business of other suitors.

For it must be admitted by plaintiff-in-error that, in the case at bar, if Edmund F. Hanks lived more than 100 miles from New York City, such examination before trial could have proceeded *de bene esse*.

Lowrey v. Kusworm, 66 Fed. R., 539.

As the New York Court of Appeals has said:

> "It becomes a fair struggle for truth, and "both parties may participate. The record of "the examination is placed on file and both "sides know what must be met if it is intro- "duced in evidence, as it may be. The statute "upon this construction becomes a valuable "accession to the rules for administering jus- "tice, and not an instrument to be used by "one party to surprise his antagonist at "the trial, or, in some cases, possibly him- "self."
>
> Lyons vs. Manhattan Ry. Co., 142 N. Y., 306.

In the case at bar, the deposition of Hanks, requisite to prove multitudinous acts of infringement of a patent, and receipts therefrom, required several days of examination, and also numerous adjournments before the witness could be induced to produce the books which were indispensable. It seems clear that a "failure or delay of justice" was inevitable in this case without this remedy, not so onerous upon witness as would have been compulsory attendance in court before and at the trial. It may be said that such an examination is necessary to prevent failure of justice in any action at law to recover on numerous and extended acts of infringement of patents.

SECOND.

The granting of the order by the Circuit Court rested wholly in its discretion.

By Act of Congress of June 1, 1872, known as the Act of Conformity (R. S., Sec. 914), as construed by this court, the adoption of state practices, pleadings, forms and modes of proceeding

by the Circuit Court rests altogether within the *discretion* of the Circuit Court.

> "The conformity is required to be 'as near "as may be'—not as near as may be *possible* "or as near as may be *practicable*. This in- "definiteness may have been suggested by a "purpose; it devolved upon the judges to be "affected, the duty of construing and decid- "ing, and gave them the power to reject, as "Congress doubtless expected they would do, "any subordinate provision in such State Stat- "utes which, in their judgment would un- "wisely encumber the administration of the "law, or tend to defeat the ends of justice in "their tribunals. While the Act of Congress "is, to a large extent, mandatory, it is also to "some extent, only directory and advi- "sory."
>
> R. R. Co. v. Horst, 93 U. S., 291, 301.
> Cited with approval in Phelps v. Oaks, 117 U. S., 236, 239.

> "It was the purpose of Congress to bring "about a general uniformity in federal and "state proceedings in civil cases, and to con- "fer upon suitors in courts of the United "States the advantage of remedies provided "by state legislation, yet that it was also the "intention to reach such uniformity often "largely through the discretion of the Federal "Courts, exercised in the form of general "rules adapted from time to time, and so "regulating their own practice as may be "necessary or convenient for the advancement "of justice and the prevention of delays in "proceedings."
>
> Shepard v. Adams, 168 U. S., 618, 625.

Such discretion has been exercised by the Circuit Court as is evidenced by Judge Lacombe's decision and opinion quoted on page 5 of this brief. The language of the Act of 1892—"it shall be lawful to take the depositions" is obviously

permissive and discretionary by its very terms. Even under the state practice under the Code of Civil Procedure, as construed by the New York Court of Appeals in the leading case of Jenkins v. Putnam (106 N. Y., 272, 275), although the language of the statute (Code of Civil Proceedure, Section 873) is mandatory in that it provides that:

> "the judge to whom such an affidavit is pre-
> "sented must grant an order for the examina-
> "tion if an action is pending,"

yet the N. Y. Court of Appeals has expressly held that the granting of the order by the judge rests in his sound discretion in all cases, even though the affidavits presented are sufficient under Section 872 of the Code.

Therefore, in the case at bar, when the request by the plaintiff in the court below for this order for examination of defendant's president before trial was made to the Circuit Judge, the granting of said order rested wholly in the *discretion* allowed him not only under the strict New York Code practice, but also allowed him under the act of conformity (R. S., 914), under which latter Act the Circuit Court might have declined to avail itself of such a mode of proof on the ground that it was not

> "necessary or convenient for the advance
> "ment of justice and the prevention of delays
> "in proceedings" (168 U. S., 625)

in Federal tribunals, even if such an order had been a strict matter of right under the State practice.

The purview of the Conformity Act is such that inasmuch as at least one party to a suit in a Federal Court must be necessarily a citizen of the State wherein the court is held, Congress deemed it advisable to secure by said Act general uniformity in proceedings in civil causes in the State and Federal

Courts through the enactment of the permissive, discretionary powers therein contained.

Shepard v. Adams, 168 U. S., 625.

Therefore the argument urged by the plaintiff-in-error in the court below that the Federal Courts will be obligated to submit to any and all modes, however objectionable, prescribed by the Legislatures of the States within their respective circuits, falls, owing to this court's aforesaid repeated limitations of the scope of the Act of Conformity, and it consequently follows that the Act of 1892, far from opening the door to injurious practices, merely adds salutarily to the powers of the Federal Courts by endowing them with such additional means for the prevention of a "failure or delay of justice," as have been approved by the people of their circuits through their Legislatures, and likewise have, as in the present instance, proved acceptable to the Federal Judiciary, and in fact indispensable to the thorough and comprehensive proof of the multitudinous infringements, and resulting damages to which plaintiff herein is entitled.

FINALLY.

The question certified to this Court by the Circuit Court of Appeals for the Second Circuit should be answered in the affirmative.

Dated, New York, April 10th, 1904.

Respectfully submitted,

WALTER D. EDMONDS,

Of Counsel for Defendant-in-Error.